February 12, 1990

MEMORANDUM

TO: The Honorable Duane Kanuha
Director of Planning, County of Hawaii

ATTN: Earl M. Lucero, Planner

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Drafts of Correspondence and Staff Notes About an Alleged Zoning Violation

This is in response to your request for an advisory opinion regarding the disclosure of a government agency's drafts of its correspondence ("drafts") and notes written by an agency employee regarding an alleged zoning violation ("employee's notes").

ISSUE PRESENTED

Whether the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, requires public disclosure of a government agency's drafts of its correspondence and an employee's written notes regarding an alleged zoning violation.

BRIEF ANSWER

Drafts of correspondence and employees' notes are types of inter-agency or intra-agency memoranda, and when maintained by an agency, they constitute government records as defined by section 92F-3, Hawaii Revised Statutes. Under section 92F-13(3), Hawaii Revised Statutes, government records are not required to be made public if disclosure would frustrate a legitimate government function. The legitimate government function of

agency decision-making would be frustrated by the disclosure of inter-agency and intra-agency memoranda that are predecisional and deliberative because public disclosure would inhibit the candid discussion and deliberation within and among agencies that are essential to agency decision-making. An agency, however, may choose to voluntarily disclose inter-agency or intra-agency memoranda that are not required to be made public under the UIPA exception for frustration of a legitimate government function.

A draft of correspondence is predecisional and deliberative because it reveals the author's preliminary and tentative views and may also contain editorial judgments made in the review process. To prevent the frustration of agency decision-making, the UIPA does not require disclosure of employees' notes that are predecisional and deliberative and those that contain facts "inextricably intertwined" with deliberative material. Where the disclosure of an employee's notes will not frustrate agency decision-making because the contents are purely factual, the UIPA nevertheless does not require disclosure if it would frustrate the legitimate government function of law enforcement.

FACTS

The Planning Department ("Department"), County of Hawaii, prepares drafts of correspondence to persons whose properties allegedly violate the county zoning code ("alleged violating parties"), including drafts of notices about alleged zoning violations and warnings about measures to be taken if a zoning violation is not remedied. A draft is submitted to the Planning Director for review and possible revision. After the Director's review, the draft, including any revisions made by the Director, is used to prepare the final document which will be signed by the Director and sent to the respective alleged violating party. The Department maintains a copy of the final document and makes it public. The Department also maintains a copy of the draft.

In addition, the Department's employees frequently write notes about an alleged zoning violation to assist the Department in determining whether a zoning violation exists and the appropriate corrective measures. A typical departmental record about an alleged violation may contain employees' written notes describing their observations about the alleged zoning violation, their opinions and recommendations, and the research performed regarding the applicable provisions of the county zoning code. The employees' notes may also summarize oral statements made, in

person or on the telephone, by a complainant, an alleged violating party, or the alleged violating party's attorney. The Department currently keeps employees' notes confidential.

You have requested an advisory opinion regarding whether the UIPA requires public disclosure of the drafts of correspondence to alleged violating parties and the employees' written notes about an alleged zoning violation.

DISCUSSION

A. Frustration of a Legitimate Government Function

Drafts of correspondence and employees' notes are types of inter-agency or intra-agency "memoranda," namely "communication[s] written for interoffice circulation" or intra-office circulation. Webster's Ninth New Collegiate Dictionary 740 (1988); cf. Conoco Inc. v. U.S. Dep't. of Justice, 687 F.2d 724, 727 (3d Cir. 1982) (the court affirmed the lower court's holding that an "intra-agency memorandum" is not required to be circulated within the agency and that this definition includes employees' handwritten notes "which remain within the files or confines of the agency"). If drafts or notes are maintained by a government agency, they constitute "government records" which, as defined by the UIPA, means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989) (emphasis added). The UIPA principles regulate the disclosure of "government records" and, therefore, apply to drafts and notes that are, in fact, maintained by an agency. The UIPA, however, does not govern agencies' retention of records such as drafts and notes.

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). In section 92F-13, Hawaii Revised Statutes, the UIPA provides five exceptions to this general rule, including the relevant exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989).

The Office of Information Practices ("OIP") previously opined that disclosure of certain intra-agency and inter-agency

memoranda or correspondence would frustrate the legitimate government function of agency decision-making. See OIP Op. Ltr. No. 89-9 (Nov. 20, 1989); OIP Op. Ltr. No. 90-3 (Jan. 18, 1990). In these advisory opinions, reference was made to case law under the federal Freedom of Information Act ("FOIA") for guidance about what government records, if publicly disclosed, would frustrate agency decision-making. The FOIA does not require disclosure of such records under the FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. . 552(b)(5) (1988). Although the UIPA does not contain identical language, case law regarding this FOIA exemption is instructive in interpreting the "frustration of legitimate government function" exception under the UIPA.

According to FOIA case law, the "deliberative process privilege," under the FOIA exemption, 5 U.S.C. . 552(b)(5), applies to inter-agency and intra-agency memoranda that are "predecisional" and "deliberative." The protected memoranda can generally be described as follows:

> To come within Exemption 5, a government document must be both predecisional' and deliberative.' A document is predecisional when it is received by the decisionmaker on the subject of the decision prior to the time the decision is made,' and deliberative when it reflects the give-and-take of the consultative process.' The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'

Schell v. U.S. Dep't. of Health & Human Services, 843 F.2d 933, 940 (6th Cir. 1988) (citations omitted); see generally Office of Information and Privacy, U.S. Dep't. of Justice, Freedom of Information Case List 397-404 (1988) ("FOIA Case List"). In Schell, the court held that a memorandum written by employees to a superior, expressing opposition to suggested policy changes, was predecisional and deliberative although the views in the memorandum were not formally accepted or rejected by the superior and could not be identified with any specific agency decision. So long as disclosure would "stifle open and frank communication between subordinates and superiors," the FOIA exemption would protect the memorandum from disclosure. Id. at 941.

We believe that under the UIPA, the disclosure of inter-agency and intra-agency memoranda that are predecisional and deliberative would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies. As is well-recognized in the FOIA legislative history and case law, the candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure. See generally FOIA Case List 397. Specifically, an exception for disclosure prevents frustration of agency decision-making because:

> [I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Dep't. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (describing the deliberative process privilege under the FOIA exemption, 5 U.S.C. . 552(b)(5)); see generally J. O' Reilly, Vol. II Federal Information Disclosure . 15.02 (1989).

The UIPA exception in section 92F-13(3), Hawaii Revised Statutes, protects the legitimate government function of decision-making, rather than a particular type of record. Consequently, when the decision-making process has ended on a particular issue or policy, any record describing the final decision or policy is not protected by the deliberative process privilege. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 153, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975); see generally J. O' Reilly, Vol. II Federal Information Disclosure . 15.09 (1989); FOIA Case List 400-401. Furthermore, if an inter-agency or intra-agency memorandum is predecisional or deliberative, its protected status may be lost when an agency's final decision "chooses expressly to adopt or incorporate [it] by reference." Id. at 161 (emphasis in original); see also OIP Op. Ltr. No. 90-3 (Jan. 18, 1990) (auditor's recommendations in an intra-agency report were expressly adopted in an agency's final decision and,

therefore, were not protected from disclosure by the "deliberative process privilege").

Since purely factual material does not ordinarily implicate the decision-making process, it is often not protected under the deliberative process privilege. See OIP Op. Ltr. No. 89-9 (Nov. 20, 1989) (agency decision-making would not be frustrated by the disclosure of the names of members serving on a student admissions committee since the names were purely factual information and disclosure would not inhibit discussion or deliberation in any way). In OIP Opinion Letter No. 89-9, we noted that the federal courts have only protected factual information from disclosure under two circumstances. The first circumstance occurs where a document employs specific facts out of a larger group of facts and this very act is deliberative in nature. See, e.g., Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974). The second circumstance occurs where the information is so inextricably connected to deliberative material that its disclosure will expose or cause harm to the agency's deliberations. See, e.g., Wolfe v. Dep't of Health and Human Services, 839 F.2d 774 (D.C. Cir. 1988); see generally FOIA Case List 402-403.

Where an intra-agency or inter-agency memorandum includes purely factual matter as well as deliberative material, an agency must disclose those portions that are public and reasonably segregable. Whether segregation is reasonable depends on the portion of information in the record that is public and how the public information is dispersed throughout the record. See Mead Data Central, Inc. v. U.S. Dep't. of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977). It is possible that segregation would not be reasonable, for example, if "stripping them [the records] down to their bare-bone facts would render them either nonsensical or perhaps too illuminative of the agency's deliberative process." Local 3, IBEW v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (because the intra-agency memoranda were so short, segregation would not have been reasonable).

An agency may choose to voluntarily disclose intra-agency and inter-agency memoranda that are not required to be disclosed under the UIPA exception based on frustration of government function. Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). Like the FOIA exemption, this UIPA exception is permissive rather than mandatory. "Since the process of decision making is as vulnerable or invulnerable as the operators of the process know or believe it to be, an agency could make all its staff papers, and

all its internal legal memoranda, publicly available, if it wished to." J. O' Reilly, Vol. II Federal Information Disclosure . 15.17 (1989). An agency's voluntary disclosure of an inter-agency or intra-agency memorandum that is predecisional and deliberative waives the application of this UIPA exception to that record. The information thereafter becomes publicly available. See, e.g., Mobil Oil Corp. v. U.S. EPA, 879 F.2d 698, 700 (9th Cir. 1989).

B. Drafts of Correspondence

Although a particular government record in its final form may be available for public inspection and duplication, a previous draft of that record is often protected from disclosure because disclosure would frustrate agency decision-making. "Draft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" Exxon Corp. v. Dep't. of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (citation omitted); see generally J. O' Reilly, Vol. II Federal Information Disclosure . 15.07 (1989).

According to FOIA case law, the deliberative process privilege protects from disclosure the drafts of government records that, in their final form, are public, such as agency rulings, Arthur Anderson and Co. v. IRS, 679 F.2d 254 (D.C. Cir. 1982); regulations, Pies v. United States, 668 F.2d 1350 (D.C. Cir. 1981); technical memoranda about issued tax regulations, King v. IRS, 684 F.2d 517 (7th Cir. 1982); and historical manuscripts, Dudman Communications Corp. v. Dep't. of Air Force, 815 F.2d 1565 (D.C. Cir. 1987).

Disclosure of a draft can frustrate agency decision-making even where its contents are purely factual. See Dudman Communications Corp. v. Dep't. of Air Force, 815 F.2d 1565 (D.C. Cir. 1987). In Dudman, the court held that the deliberative process privilege applied to the draft of a historical manuscript about the air force because:

> The disclosure of editorial judgments--for example, decisions to insert or delete material or to change a draft's focus or emphasis--would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work . . . The danger of

> "chilling" arises from disclosure that the Air Force as an institution made changes in a draft at some point . . .

815 F.2d at 1569 (applying its holding in Russell v. Dep't. of Air Force, 682 F.2d 1045 (D.C. Cir. 1982)). In Dudman, the court found that disclosure of a draft would reveal the many editorial judgments made by the Air Force, as an institution, during the process of compiling the official history. Id. at 1568.

A draft of correspondence to an alleged violating party may contain some deliberative and predeliberative material, or it may contain purely factual contents. Even if purely factual, a draft of correspondence exposes the tentative substance, wording, and format proposed by the employee who prepared it, as well as the editorial judgments of the Planning Director who accepted parts of it, while possibly revising or rejecting others. Whether a draft of correspondence contains deliberative material or not, disclosure in either case will "chill" the free exchange during the editing process since the Department will be judged by the tentative contents and the editorial judgments revealed in the draft. Consequently, the UIPA does not require the disclosure of a draft of correspondence since disclosure would frustrate agency decision-making in the editing process.

C. Employees' Written Notes

The notes that the Department's employees write about an alleged zoning violation assist the Department in its investigation of the alleged zoning violation and its enforcement of the governing laws and codes. Under FOIA case law, employees' notes taken during a civil law enforcement investigation are protected under the deliberative process privilege when the notes "reflect the deliberative processes . . . in investigating, drafting, and filing charges." Marathon LeTourneau Co., Marine Div. v. NLRB, 414 F. Supp. 1074, 1080 (S.D. Miss. 1976); accord Joseph Horne Co. v. NLRB, 455 F. Supp. 1383, 1387 (W.D. Penn. 1978). In Marathon LeTourneau Co., the court held that the privilege applied to employees' file notes, investigative interview notes, and recommendations and that, after careful in camera inspection, segregation was not reasonable. Id.

Under FOIA case law, the deliberative process privilege has been readily found to protect employees' notes and other

memoranda that give opinions, suggestions, and thoughts on agency matters. For instance, an employee's notes taken at meetings to formulate and prepare the agency's position in an amicus brief were exempt from disclosure, Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989), as were other types of intra-agency memoranda describing the following: summaries of staff discussions about the merits of various positions in pending contract negotiations, Mead Data Central, Inc. v. Dep't. of Air Force, 566 F.2d 242 (D.C. Cir. 1977); employees' analyses and recommendations in pending administrative cases, Local 3, IBEW v. NLRB, 845 F.2d 1177 (2d Cir. 1988); and an employee's review of options and recommendations on pending issues, ITT World Communications, Inc. v. FCC, 699 F.2d 1219 (D.C. Cir. 1983).

Like other types of inter-agency or intra-agency memoranda, an employee's notes may contain factual information in support of predecisional and deliberative material. Under FOIA case law, factual notes are also exempt from disclosure under the deliberative process privilege when they are " inextricably intertwined' with the reasoning and conclusions that form the basis of the author's recommendations and advice." Cities Service Co. v. FTC, 627 F. Supp. 827, 836 (D.D.C. 1984). In Cities Service Co., the court held that the deliberative process privilege applied to employees' notes of meetings with oil company representatives "because the selection of relevant facts [in the notes] reflected each author's weighing and evaluation of matters considered significant" and was then used to assist the FTC in its decision. Id.; see also Lead Industries Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979) (employee's memorandum summarizing factual material in support of a proposed regulatory standard); Montrose Chemical Co. v. Train, 491 F.2d 63 (D.C. Cir. 1974) (evidence summaries prepared by staff to assist agency head in decision-making).

Employees' notes taken in the course of an investigation of an alleged zoning violation often contain factual information "inextricably intertwined" with decision-making in the investigation. The notes written by a Department employee recording observations made of an alleged zoning violation are to a large extent factual, but may also reveal the employee's personal judgments about which facts observed are important to the investigation and the employee's initial deductive conclusions based upon these particular facts. Similarly, an employee's notes about preliminary research of the county zoning code may reveal the employee's personal judgment about which zoning code provisions are relevant to an alleged zoning violation and how

these code provisions should be interpreted for a particular violation. Although commingled with factual material, personal judgments and initial conclusions about an investigation revealed in these notes are just as predecisional and deliberative as notes providing overt ideas, opinions, and recommendations, and disclosure is not required under the UIPA, unless the notes are expressly adopted or incorporated by reference in a final decision.

In certain FOIA cases, the courts considered employees' notes about private persons' oral statements in a law enforcement investigation to be equivalent to written statements and affidavits provided by the interviewed persons. Poss v. NLRB, 565 F.2d 654, 659 (10th Cir. 1977); Associated Dry Goods Corp. v. NLRB, 455 F. Supp. 802, 811 (S.D. N.Y. 1978). In these cases, the courts found that like written statements or affidavits, employees' notes about private persons' oral statements were not predecisional and deliberative since they revealed communications with outside parties but nothing about the "give and take" in the decision-making process within or among government agencies. Id. If considered to be like a written statement or affidavit of the interviewed person, employees' notes about a private citizen's oral statements, when disclosed, may not inhibit discussion in agency decision-making during an investigation, although disclosure could frustrate the agency's law enforcement function during the investigation or proceeding. Willard v. IRS, 776 F.2d 100 (4th Cir. 1985). In Willard, the court held that IRS agents' notes of investigative interviews were protected from public disclosure, including disclosure to the interviewed individuals, under FOIA, 5 U.S.C. . 552(b)(7)(A), because disclosure would interfere with a joint civil and criminal investigation.

Generally, employees' notes and other memoranda about a law enforcement investigation are not required to be disclosed during the investigation or proceeding because disclosure would thwart the agency's investigative and enforcement efforts. See, e.g., J.C.B. Ehringhaus, Jr. v. FTC, 525 F. Supp. 21, 23 (D.D.C. 1980); State ex. rel. City of Bartow v. Public Employees Relations Commission, 341 So. 2d 1000, 1003 (Fla. Dist. Ct. 1977). Furthermore, if information in an employee's notes, or in any other government record, reveals the identity of a confidential complainant, that information is confidential even after an investigation. See OIP Op. Ltr. No. 89-12 (Dec. 12, 1989) (a complainant's identity is confidential because disclosure would frustrate the Department's law enforcement function and would constitute a clearly unwarranted invasion of personal privacy).

In the facts presented, where an employee's notes about an alleged zoning violation contain purely factual information, disclosure may not frustrate decision-making, but it would likely frustrate the Department's function of enforcing the county zoning code against an alleged zoning violation. The UIPA's legislative history lists "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," which include "[r]ecords or information compiled for law enforcement purposes." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Since these notes are compiled for law enforcement purposes, the Department is not required to disclose them if to do so would result in the frustration of its legitimate government function of law enforcement. Furthermore, information is confidential under the UIPA when disclosure would constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. § 92F-13(1) (Supp. 1989); see OIP Op. Ltr. No. 89-12 (Dec. 12, 1989) (disclosure of a complainant's identity would constitute a clearly unwarranted invasion of personal privacy).

CONCLUSION

Inter-agency and intra-agency memoranda, such as drafts of correspondence and employees' notes, are government records under the UIPA when maintained by a government agency. As recognized under FOIA case law, disclosure of inter-agency and intra-agency memoranda that are predecisional and deliberative would chill the candor and free exchange in the consultative process of agency decision-making. Since disclosure of these records would frustrate the legitimate government function of agency decision-making, disclosure is not required under section 92F-13(3), Hawaii Revised Statutes. However, the UIPA does require disclosure of public portions of inter-agency and intra-agency memoranda that are reasonably segregable. For instance, if an agency's final decision or policy expressly adopts or incorporates by reference any part of a memorandum not required to be disclosed, that part of the record would also become public information.

Even where a final document, such as the Department's correspondence to an alleged violating party, is public under the UIPA, a draft of that record is not required to be disclosed since the draft reveals tentative views and editorial judgments that are predecisional and deliberative. With respect to employees' notes about an alleged zoning violation, predecisional

and deliberative information and factual information "inextricably intertwined" with deliberative processes are not required to be disclosed in order to avoid the frustration of the legitimate agency function of decision-making. Although an employee's notes may not implicate the Department's decision-making, they nevertheless are not required to be disclosed during the investigation of the alleged zoning violation if disclosure would frustrate the Department's law enforcement functions. An agency may voluntarily disclose drafts or notes protected by the exception for frustration of a legitimate government function, if it chooses to do so.

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APPROVED:

Kathleen A. Callaghan
Director